STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2010
v	No. 284309 Wayne Circuit Court
DESHAWN MAVRISE PARKER, Defendant-Appellant.	LC No. 07-015214-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; assault with intent to commit murder, MCL 750.83; and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm defendant's convictions, but remand to the trial court for the ministerial task of modifying his convictions and sentences to reflect one conviction and sentence for first-degree murder premised on two theories.

Defendant first argues that the trial court incorrectly instructed the jury that it could "infer that the Defendant aided and abetted the killing while participating in the underlying offense of robbery and/or larceny." Defendant did not object when the trial court gave the challenged instruction, and defense counsel indicated that the defense was "satisfied" with the instructions as given. "Counsel's affirmative expression of satisfaction with the trial court's instructions waived any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Thus, defendant waived any claim of error on appeal when he indicated that he was satisfied with the instructions as given in the trial court.

Defendant also argues ineffective assistance of counsel for failure to object to the instructions. The unpreserved ineffective assistance of counsel claim is reviewed for any errors that are apparent on the record available. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A defendant must show that defense counsel's performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms, and that he suffered prejudice as a result of the deficient performance, such that there is a reasonable probability that, absent the error, the outcome of the trial could have been different. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994).

When reviewing the trial court's instructions for error, "this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997) (Riley, J.). We conclude that the instructions were legally accurate, adequately protected defendant's rights, and do not constitute plain error. To prove felony murder and aiding and abetting, the prosecutor must establish:

> 1) the killing of a human being, 2) malice, and 3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in the statute, among them armed robbery. To establish guilt under an aiding and abetting theory, the prosecution must proffer evidence that
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> "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." [*People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566, 568; 540 NW2d 728 (1995).]

In order to show malice as required for felony murder in an aiding and abetting case

> the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with "wanton and willful disregard" sufficient to support a finding of malice. [*People v Riley*, 468 Mich 135, 140-141; 659 NW2d 611 (2003).]

In the present case, the trial court instructed the jury on felony murder under an aiding and abetting theory:

> The Defendant is guilty of aiding and abetting felony murder if the Defendant performed or actually gave encouragement that assisted in the commission of the killing of a human being, with the intent to kill, create great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit or assisting someone else in the commission of the predicate felony here robbery and/or larceny. Aiding and abetting describes all forms of assistance in the perpetration of a crime and comprehends all words and deeds that might support, encourage or incite the commission of a crime. *A jury may infer that the Defendant aided and abetted the killing while participating in the underlying offense of robbery and/or larceny.*

> Now, felony murder. The Defendant is charged with the separate offense of first-degree felony murder. To prove this charge, the prosecutor must prove the following beyond a reasonable doubt:
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> First, that the Defendant caused the death of Mr. Morales. That is, that Morales died as a result of gunshot, being shot by the Defendant.
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> Second, that the Defendant had one of these three states of mind at the time, he intended to kill Morales or he intended to do great bodily harm to Morales or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would we [sic] the likely result of his actions.
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> Third, that when he did the act that caused the death of Morales, the Defendant was committing or attempting to commit or helping someone else commit the crime of robbery.
>
> For the crime of robbery, I'll give you those elements here in a minute.
>
> And fourth, that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime.
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> The Defendant must have been either committing or helping someone else commit the crime of robbery. To help means to perform acts or give encouragement before or during the commission of the crime that aids or assists in the commission of that crime. At the time of giving aid or encouragement the Defendant must have intended the commission of the robbery.

There was no plain error in the trial court's instructions. The trial court's instructions must be viewed as a whole, instead of piecemeal. *Dumas*, 454 Mich at 396. Its instruction that the jury could infer that defendant aided and abetted the killing out of his participation in the underlying felony was consistent with the law. "A jury may infer that the defendant aided and abetted the killing by participating in the underlying offense." *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004). Further, the trial court never improperly instructed the jury that it could find the requisite malice solely from defendant's intent to commit the underlying felony. *People v Aaron*, 409 Mich 672, 730; 299 NW2d 304 (1980). The trial court specifically instructed the jury that in order to convict him of felony murder, it had to find that he had the requisite mental state for felony murder, i.e., malice. Further, the aiding and abetting instruction informed the jury that defendant had to encourage or perform the killing *while having the intent to kill, create great bodily harm, or create a high risk of death knowing that death or great bodily harm was a probable result*, while assisting in the commission of the underlying felony. The jury could permissibly infer that defendant acted with malice where he participated in the crime while knowing that the principal had the intent to kill or cause great bodily harm. *Riley*, 468 Mich at 140-141. It was also permissible for the jury to infer that defendant had the requisite state of mind based on the nature of the underlying armed robbery and the circumstances surrounding the robbery, and from defendant's use of a deadly weapon. *Aaron*, 409 Mich at 729-730; *Carines*, 460 Mich at 759.

Because the instructions were accurate, any objection would have been futile. Defense counsel cannot be deemed ineffective for failing to raise a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that his convictions and sentences for felony murder and first-degree premeditated murder violate his double jeopardy rights. "Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. The proper remedy is to modify the judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). Defendant's convictions and sentences for felony murder and first-degree premeditated murder are for the same victim, Jeremy Morales, and therefore violate his constitutional protections against double jeopardy. *Id.* We remand for a correction of the judgment of sentence and order the trial court to modify the judgment to reflect one conviction and sentence for first-degree murder, supported by the two theories of premeditated murder and felony murder.

Defendant also raises several claims of error in his standard 4 brief. He first argues that the prosecutor committed misconduct in bolstering witnesses' credibility and misrepresenting the evidence in her arguments. Defendant concedes that these claims are unpreserved. Review of prosecutorial misconduct is thus precluded unless a timely objection would have failed to cure the error or a miscarriage of justice would result. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

The prosecution may not knowingly offer inadmissible evidence or attempt to elicit inadmissible evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). A good faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The prosecutor has "a duty to disclose promises made to obtain an accomplice's testimony. A passing reference to an agreement containing a promise of truthfulness is not, without more, grounds for reversal." *People v Rosales*, 160 Mich App 304, 310-311; 408 NW2d 140 (1987) (citations omitted).

We conclude that the prosecutor did not improperly bolster the testimony of defendant's accomplices, Maurice Mosley and Craig Dixon. The record reflects that the prosecutor elicited the fact that Mosley and Dixon had struck plea bargains with the prosecution to testify against defendant, and that they had given statements to police after their arrest, the contents of which Mosley and Dixon testified were true, and Mosley and Dixon also testified that their testimony at trial was true. The prosecutor never personally vouched for the credibility or Mosley or Dixon during her questioning by insinuating that she possessed special knowledge that Mosley and Dixon were being truthful. *Bahoda*, 448 Mich at 276. Moreover, the prosecutor was permitted to refresh Mosley's recollection with his police statement after Mosley testified that he did not recall what defendant was doing while Mosley held the gun during the robbery. MRE 803(5); MRE 612. When Dixon testified inconsistently with his statement, the prosecutor was permitted to impeach him with prior inconsistent statements. MRE 607; MRE 613(b). "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

We also find no misconduct in the prosecutor's arguments. A prosecutor is prohibited from misstating facts or arguing facts that are not introduced into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). The prosecutor may respond to the defendant's arguments and argue that a witness is or is not worthy of belief. *People v Thomas*, 260 Mich App 450, 454-455; 678 NW2d 631 (2004). The prosecutor's closing arguments here carried no claim that she had special knowledge that the accomplices were being truthful. The prosecutor merely argued that their testimony was consistent with each other and with the physical evidence of the case. The prosecutor's arguments further responded to defendant's assertion that Dixon and Mosley were not credible because they testified against defendant in exchange for a plea deal, they had motivation to implicate defendant, they gave inconsistent testimony, and minimized their participation in the crimes. Moreover, the trial court instructed the jury that the lawyers' statements and arguments were not evidence and to evaluate accomplice testimony carefully. "[T]he judge's instruction that arguments of attorneys are not evidence dispelled any prejudice." *Bahoda*, 448 Mich at 281.

Defendant also argues that his counsel was ineffective for failing to object to the prosecutor's alleged misconduct. However, the prosecutor did not improperly bolster witnesses or misrepresent the evidence. Defense counsel cannot be deemed ineffective for failing to raise a meritless argument. *Snider*, 239 Mich App at 425.

Defendant next argues that defense counsel rendered a deficient performance because she failed to highlight the inconsistencies in Dixon's and Mosley's testimony. Trial counsel's decision regarding what information to focus on in closing argument is presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant's assertion that defense counsel failed to emphasize inconsistencies in her closing argument is inaccurate. The record reflects that defense counsel emphasized several inconsistencies in the testimony during her closing argument. Defendant has otherwise failed to overcome the presumption that counsel's decisions regarding what information to present during her argument was a matter of trial strategy. *Id.*

Lastly, defendant argues that counsel was ineffective because she failed to further investigate whether there was a Pistons game on the night of the incident, February 22, 2007. Defendant's alibi witness, Carol Durham, testified that defendant was at her house at the time of the incident, watching a Pistons game and playing cards with her son and their friends.

Defense counsel had a duty to reasonably investigate defendant's case. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Although counsel's strategic judgments are afforded deference, strategic decisions made after an incomplete investigation are reasonable only to the extent that reasonable professional judgment support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

We note that because defendant's ineffective assistance claim is unpreserved, review of any errors is limited to the record available. *Matuszak*, 263 Mich App at 48. The record does not reflect that defense counsel inadequately investigated Durham in preparation for her alibi defense. Further, after defendant presented his alibi evidence and rested, the prosecutor informed the trial court the next day that the Pistons' schedule showed that there was no game on February 22. The trial court took judicial notice of this fact. Defense counsel indicated that she

was "stunned" and stated: "I didn't know there was going to be a Pistons game testified to here. I didn't have enough notice to see if something might have been a little different." We conclude that the record supports that defense counsel was unaware before trial that there would be any testimony about a Pistons game, despite having contact with Durham. The prosecutor seemed to be similarly in the dark about this fact, despite also having interviewed Durham before trial. Defendant has failed to establish that defense counsel performed an inadequate investigation of his case when she was unaware of the existence of such information or the need to further investigate it. *McGhee,* 268 Mich App at 626.

Moreover, regardless of Durham's testimony, defendant also testified that there was a Pistons game on February 22. There is no indication that defense counsel advised or pressured defendant into testifying that there was a Pistons game. On the record, defendant has failed to establish that defense counsel rendered ineffective assistance. *Pickens,* 446 Mich at 312-314.

Affirmed, but remanded to the trial court to effect the ministerial changes to defendant's judgment of sentence noted above. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro